COURT OF APPEALS
DECISION
DATED AND FILED

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Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 00-1612-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TIMOTHY ZIEBART,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DIANE S. SYKES and JOHN DiMOTTO, Judges.[1] *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

[1] The Hon. Diane Sykes presided over the trial and sentencing; the Hon. John DiMotto entered the order denying the motion for postconviction relief.

¶1 PER CURIAM Timothy Ziebart appeals from a judgment of conviction for robbery, kidnapping, impersonating a peace officer, intimidating a victim, and two counts of second-degree sexual assault, all as a habitual criminal, following a jury trial. He also appeals from an order denying his motion for postconviction relief. He argues that: (1) the trial court erred in admitting other acts evidence; (2) the postconviction court erred in denying his motion for a new trial based on newly discovered evidence; (3) the postconviction court erred in doing so without first granting an evidentiary hearing; and (4) his sentence is unduly harsh. We affirm.

I. BACKGROUND

¶2 Mary S. testified that on the evening of August 23, 1997, after spending the day engaging in prostitution to obtain cocaine, she was coming down from a cocaine high when she and her girlfriend had an altercation with some unknown individuals on National Avenue. At that moment, a stranger, later identified as Ziebart, drove up and asked her if she needed a ride. She testified that she told Ziebart that she "was not dating" (meaning that she was not offering to commit prostitution), but that she could use a ride. Ziebart told her that was fine, stating, "I can give a beautiful lady a ride home."

¶3 Upon entering the car, Mary told Ziebart that she lived in Cudahy and offered to pay him for the ride. Ziebart declined the offer and proceeded to a Marathon gas station where he offered to buy her a soda. After returning to the car, he stuffed something between the seats, but Mary did not see what it was. As they approached her home, Mary asked Ziebart to pull over and let her out of the car. Ziebart, however, reached across her, locked her door, grabbed her wrist, and told her to do what he said or he was going to kill her. After parking the car,

Ziebart ordered Mary to remove her pants and shoes; he then removed a box of condoms from between the seats, opened one, telling her he did not want to catch any diseases from a "crack whore," and had sexual intercourse with her. Afterwards, he ordered her to "suck his fat dick," while continually berating her for being a "crack whore."

¶4 Ziebart then drove to Sheridan Park, where Mary unlocked the car door and tried to escape. Ziebart pursued her, tripped her, robbed her of her money and wallet, and continually threatened to kill her. Ziebart told Mary that he was a St. Francis Police Officer and that she should not consider calling the police because he and his "police brothers" would "get her." He reiterated that he and his fellow officers were "sick of crack whores on the street," and repeatedly told her not to contact police because no one would believe her.

¶5 Moments later, Ziebart fled the scene and Mary screamed for help. Several neighbors testified that they heard screams from the park and called the police. Dana Gauerke testified that she called the police after she heard a woman screaming that she had been raped. Officer Glen Haase testified that when he arrived at Sheridan Park, he found Mary disheveled and terrified. After Mary was taken to the hospital, Haase interviewed her. Haase said that at the hospital Mary was alert, sober and calm, and that she gave a detailed account of the attack.

¶6 Mary testified that several days after the assault, she received a phone call in which the caller said, "Hello, Mary, this is fat dick…." The police traced the call to Ziebart. Officer Byron McManaman testified about his subsequent interview of Ziebart, in which Ziebart denied making the call, denied stopping at the gas station, and denied assaulting Mary. After being shown the gas

station's videotape showing him there, however, Ziebart changed his story, and eventually said that he had had sex with Mary for twenty dollars.

¶7 At trial the State also introduced the testimony of Daryl H., to rebut Ziebart's claim that Mary had consented to having sex with him. Daryl testified that, several years earlier, Ziebart and others had abducted him, sexually assaulted him, and robbed him. He testified that during the assault, Ziebart continually berated and threatened him, and claimed to be a vigilante police officer on a rampage to rid the streets of drug addicts.

¶8 After a three-day trial the jury convicted Ziebart of the charges and the court subsequently sentenced him to 148 years in prison with a parole eligibility date in 2035.

II. DISCUSSION

¶9 Ziebart argues that the trial court erred in admitting Daryl's testimony. Specifically, he contends that given the substantial differences between the crimes against Mary and Daryl, and the substantial passage of time between them, the testimony was inadmissible. We disagree.

¶10 Trial courts have broad discretion to determine whether to admit or exclude evidence. ***State v. Larsen***, 165 Wis. 2d 316, 319-20, 477 N.W.2d 87 (Ct. App. 1991). Our review is limited to determining whether the trial court erroneously exercised this discretion. *See* ***id.*** at 320 n.1. We will not overturn a trial court's evidentiary ruling unless it has no reasonable basis. ***State v. McConnohie***, 113 Wis. 2d 362, 370, 334 N.W.2d 903 (1983).

¶11 WISCONSIN STAT. § 904.04(2), provides:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

To determine whether evidence of "other acts" is admissible, the trial court must engage in a three-step analysis. ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). First, the trial court must determine if the proffered evidence fits within one of the exceptions of § 904.04(2). Second, the trial court must determine if the other-acts evidence is relevant under WIS. STAT. § 904.01.[2] Third, pursuant to WIS. STAT. § 904.03,[3] the trial court must decide whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant. ***Sullivan***, 216 Wis. 2d at 772-73.

¶12 The trial court admitted the evidence under several theories, concluding that the evidence was relevant to show Ziebart's plan, motive, and intent. The court explained:

> [W]e have the defendant using a ruse, a scheme, modus operandi of impersonating a police officer in order to facilitate terrorization and victimization of people in sexual ways, whether he's the one who has the sex or whether one of his companions has the sex. That appears to be what the situation is and that being the case, the *Whitty* evidence has extremely strong similarities[;] it's not sort of a generic use of a vehicle or a scenario focused on a child, it's a very specific imprint, a specific signature type of crime and

[2] WISCONSIN STAT. § 904.01, provides: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

[3] WISCONSIN STAT. § 904.03, provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

> that's precisely what 904.0[4(2)] is supposed to permit the admission of.

We agree with the court's analysis.

¶13 Ziebart argues, however, that consent was the sole issue for the jury to determine and, therefore, that the prior act evidence was irrelevant and inadmissible. We disagree. The supreme court has broadly defined the "plan" exception of WIS. STAT. § 904.04(2) to include "a system of criminal activity" comprised of multiple acts of a similar nature, not all necessarily culminating in the charged crime or crimes. ***State v. Friedrich***, 135 Wis. 2d 1, 24, 398 N.W.2d 763 (1987). The court explained:

> [R]eliance on the "plan" exception to sec. 904.04(2), Stats., requires that an inference be drawn. McCormick states that other-acts evidence sought to be introduced to establish the existence of a plan "will be relevant as showing motive, and hence the doing of the criminal act, the identity of the actor, or his intention." While identity is not at issue in this case, the doing of the act and the intent are at issue. Defendant has denied doing the act. Moreover, intent is an element of the crime. The other-acts testimony ... is thus relevant since the "plan" established by the facts of record relates to these contested issue of fact.

Id. at 23 (citation omitted).

¶14 Here, Daryl's testimony was offered for permissible purposes. It helped to prove the crimes against Mary by showing that Ziebart had employed a similar plan, and had acted with similar motive and intent on a previous occasion. Thus, the evidence impeached Ziebert's consent defense. *See* ***State v. Roberson***, 157 Wis. 2d 447, 455, 459 N.W.2d 611 (Ct. App. 1990) (Prior act evidence can be admitted to prove intent because it "'tends to undermine the defendant's innocent explanation for his act.'").

¶15 As the supreme court recently reiterated, "If the state must prove an element of a crime, then evidence relevant to that element is admissible, even if the defendant does not dispute the element." ***State v. Hammer***, 2000 WI 92, ¶26. And here, of course, Ziebart, claiming consent, was disputing his intent to commit any crime. Thus, the State could use other acts evidence of Ziebart's assault of Daryl to help prove Ziebart's intent to commit the strikingly similar crimes against Mary.

¶16 In the instant case, Ziebart was charged with not only the second-degree sexual assaults, but also impersonating a police officer, kidnapping, intimidating a witness, and robbery. Consequently, the State had to prove intent for each of these crimes. Intent was an issue in the case because it was an element of all the crimes charged; motive was an issue because Ziebart offered innocent explanations for his conduct. Consequently, the evidence of the Ziebart's assault of Daryl was relevant to establish Ziebart's intent and motive for his crimes against Mary.

¶17 Ziebart also contends that even if Daryl's testimony was relevant, it still was inadmissible because its probative value was substantially outweighed by the danger of unfair prejudice. We disagree. "The measure of probative value in assessing relevance is the similarity between the charged offense and the other act." ***Hammer***, 2000 WI 96 at ¶ 31. Here, as the trial court explained, the acts bore striking similarities.

¶18 Ziebart and others abducted Daryl as he was walking in an alley, forced him into the truck of his car, and sexually assaulted him. Ziebart took Daryl's wallet, discovered a marijuana bud, and then threatened Daryl. Ziebart told Daryl that he was a police officer who was on a rampage to clean up the city

and rid it of low-life drug dealers and peeping Toms. Ziebart then took Daryl to a residence where Daryl was tied-up and blindfolded. The men then berated and sexually assaulted Daryl. After several hours, the men wrapped Daryl in a blanket and carried him to a car trunk.

¶19 Ziebart then told Daryl that they were going to Daryl's house to rob it. One man stayed behind with Daryl, repeatedly telling him that he would be killed unless he remained quiet. When the men returned to the car, they continued to torment Daryl, telling him that they had raped his wife during the burglary. When the car would not start, the men pushed it down a hill and abandoned it, leaving Daryl in the trunk. Daryl later escaped and ran for home. Although he saw police shortly after his escape, he testified that he was "hesitant to go talk to them" because he was worried whether it was safe to do so in light of Ziebart's warning that he was a police officer.

¶20 In the instant case, Ziebart also abducted, sexually assaulted and robbed the victim while berating her for being a prostitute and a drug addict. Like Daryl, Mary was robbed of her wallet, money and identification. Much as he had done by gaining access to Daryl's identification, Ziebart used Mary's identification to intimidate and torment her. Much as he had done in Daryl's case, Ziebart repeatedly told Mary that he was a police officer who was tired of crack addicts and was out to rid the streets of them. And, as he had done in Daryl's case, Ziebart also threatened Mary's life. Based on these similarities, we conclude that the trial court properly determined that the evidence was relevant.

¶21 Finally, we conclude that the trial court correctly determined that the probative value of Daryl's testimony was not substantially outweighed by the danger of unfair prejudice. As we have explained, the probative value was very

substantial. Any danger of unfair prejudice was effectively erased when the trial court correctly instructed the jury:

> [Daryl's testimony] was received on the issues of motive, that is, whether the defendant has a reason to desire the result of the crimes; intent, that is, whether the defendant acted with the state of mind that is required for these offenses; preparation or plan, that is, whether such other conduct of the defendant is evidence of a design or scheme that is related to or encompasses the commission of the offenses now charged; and non-consent, that is, whether the victim freely consented or did not consent to the alleged acts of the defendant in this case.
>
> You may consider this evidence only for the purposes I have described, giving it the weight you determine it deserves. It is not to be used to conclude that the defendant is a bad person and for that reason is guilty of the offenses charged.

See ***State v. Grande***, 169 Wis.2d 422, 436, 485 N.W.2d 282 (Ct. App. 1992) (jury is presumed to follow cautionary instruction). Accordingly, we conclude that the trial court properly admitted Daryl's testimony.

¶22 Ziebart next argues that the postconviction court erred in denying his motion for a new trial based on newly discovered evidence. We disagree.

¶23 As this court recently explained:

> A new trial will be granted on [the basis of newly discovered evidence] only if the defendant establishes by clear and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking to discover it; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative to the testimony introduced at trial; and (5) it is reasonably probable that, with the evidence, a different result would be reached at a new trial. The motion is addressed to the trial court's sound discretion and we will affirm the circuit court's decision if it has a reasonable basis and was made in accordance with accepted legal standards and facts of record.

State v. Carnemolla, 229 Wis. 2d 648, 656, 600 N.W.2d 236 (Ct. App. 1999) (citations omitted), *review denied*, 2000 WI 2, ___ Wis. 2d ___, 607 N.W.2d 291.

¶24 Ziebart's proffered evidence was the testimony of Dawn Goldsmith, the woman who was walking down National Avenue with Mary at the time Ziebart picked her up. According to the affidavit submitted by Ziebart, Goldsmith told his investigator:

> [B]efore Mary was picked up by Timothy Ziebart, [she and Mary] were laughing, giggling, talking, and prostituting together. They were smoking crack also and were available for "dating" (term used for prostituting) should someone come along.
>
> When [Ziebart] came by and picked Mary up in his truck, Dawn said she was absolutely sure Mary was leaving to "date" (prostitute) with [him], and said, "I know it for sure."

Ziebart maintains that if the jury had known Mary was "dating" at the time he picked her up, there would have been a different result at trial, at least with respect to the sexual assault charges. We disagree.

¶25 The critical portion of the proffered evidence would have been inadmissible. As the postconviction court explained:

> Dawn Goldsmith would not have been allowed to testify that the victim and Ziebart struck a deal for a dope date before [Mary] got into the car. This court concludes that this testimony would have been totally inadmissible because Goldsmith is unavailable to testify to any conversation between Ziebart and [Mary]. There is no evidence that she overheard the conversation between them; all she saw was the two of them talk and the victim get in the car. It is total speculation that [Mary] arranged a dope date or a date for money with Ziebart.

Additionally, as the State notes, "the admissible part of Goldsmith's testimony—that she and Mary had used drugs earlier and had dope[-]dated—would have

corroborated Mary's testimony and thus would only have strengthened the State's case." As such, it would not have been a basis for a new trial. Ziebart offers no reply to the State's argument. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec., Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed admitted). Accordingly, the postconviction court correctly concluded that "even assuming Goldsmith's testimony is newly discovered evidence, this particular testimony would not meet the fifth prong of the newly discovered evidence test as there is not a reasonable probability a new trial would produce a different result."

¶26 Ziebart also claims that the postconviction court erred in denying his motion for a new trial without a hearing. Again we disagree. A defendant is not automatically entitled to a hearing on a postconviction motion. ***State v. Bentley***, 210 Wis. 2d 303, 313, 548 N.W.2d 50 (1996). If a defendant presents only conclusory allegations, which fail to raise a question of fact, or if the record conclusively demonstrates that the defendant is not entitled to relief, then the court may deny the motion on its face. ***Id.*** Whether a motion alleges facts warranting relief and thus entitling a defendant to a hearing is a question of law, which we review de novo. ***Id.*** at 310.

¶27 In the instant case, the postconviction court properly rejected Ziebart's request for an evidentiary hearing based on its conclusion that the motion failed to show that he was entitled to relief. Specifically, the court noted that Ziebart's contention that Goldsmith's testimony would have changed the results of his trial was purely speculative. This speculation was nothing more than a conclusory inference which failed to raise a question of fact warranting relief. ***Id.*** at 310-11. Consequently, the court properly denied Ziebart's request for an evidentiary hearing.

¶28 Finally, Ziebart argues that the trial court erroneously exercised sentencing discretion. We disagree. The principles governing appellate review of a court's sentencing decision are well established. *See* ***State v. Larsen***, 141 Wis. 2d 412, 426, 415 N.W.2d 535 (Ct. App. 1987). Appellate review is tempered by a strong policy against interfering with the trial court's sentencing discretion. ***Id.*** We will not remand for resentencing absent an erroneous exercise of discretion. ***State v. Thompson***, 172 Wis. 2d 257, 263, 493 N.W.2d 729 (Ct. App. 1992). In reviewing whether a court erroneously exercised sentencing discretion, we consider: (1) whether the court considered the appropriate sentencing factors; and (2) whether the court imposed an excessive sentence. *See* ***State v. Glotz***, 122 Wis. 2d 519, 524, 362 N.W.2d 179 (Ct. App. 1984). The primary factors a sentencing court must consider are the gravity of the offense, the character of the offender, and the protection of the public. ***Larsen***, 141 Wis. 2d at 427. The weight to be given each factor, however, is within the sentencing court's discretion. *See* ***Cunningham v. State***, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977).

¶29 Here, the record reflects the sentencing court's careful consideration of the required sentencing criteria. Considering the severity of the offense, the court noted that Ziebart committed "sadistic" acts and "an extremely brutal crime on an extremely vulnerable person." The court, concerned about the emotional and physical trauma the victim had suffered as a result of the attack, observed that Ziebart had caused "havoc" in the victim's already troubled life. In addition, the court noted that the victim was further traumatized by Ziebart's intimidation.

¶30 The court also considered Ziebart's rehabilitative needs. Specifically, the court expressed concern about Ziebart's failure to appreciate the consequences of his behavior, his history of violent offenses, and his need for in-depth, long-term treatment. The court added, "[Y]ou have a serious assaultive

history[;] … three victims of your brutal and assaultive offenses … are now scarred for life and … will never recover from what it is you have done to them." The court also remarked that Ziebart committed these offenses while Ziebart on parole, and within one and one-half years of his release from prison. Consequently, the sentencing court, in considering the need to protect the public, concluded that "the community deserves maximum protection from [Ziebart's] further crimes" because he ramained "a high risk to reoffend." Accordingly, the sentencing court imposed a 148-year prison term.

¶31 The record reflects the sentencing court's proper consideration of the appropriate sentencing factors and its adequate explanation of the bases for the sentence. The court's sentencing comments reflect "a process of reasoning based on legally relevant factors." *See* ***State v. Wickstrom***, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984) (appellate court has duty to affirm sentencing decision if trial court "engaged in a process of reasoning based on legally relevant factors").

¶32 Further, we do not conclude that "the sentence imposed is so excessive and unusual and so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Considering Ziebart's history and rehabilitative needs, and considering the emotional and physical trauma suffered by Mary, the sentence is not unduly harsh or excessive.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.